IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 791 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

==========

SINDHI VASUDEV CHOITHRAM - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
MR PM THAKKAR for Appellant(s) : 1,
MR AJ DESAI, LD.APP for Opponent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 15/02/2007

ORAL JUDGMENT

1. The present appeal is preferred by the appellant-orig.accused (hereinafter referred to as 'the appellant') under Section 374 read with Section 386 of the Code of Criminal Procedure, 1973, against the judgment and order of conviction and sentence dated 06th

August, 1994, passed by the learned Additional Sessions Judge, Bhavnagar, in Special Criminal Case No.4 of 1994, whereby the learned Judge has convicted and sentenced the appellant to undergo rigorous imprisonment for two years and a fine of Rs.2000/-and in default of payment of fine rigorous imprisonment for six months, under Section 7 and 12(AA) for the breach of Section 3 of the Essential Commodities Act.

2. Shri H.N. Joshi, learned counsel appearing on behalf of Shri P.M. Thakkar, learned senior counsel appearing for the appellant, has taken me through the oral as well as documentary evidence led during the course of trial and main grounds of challenge mentioned in the memo of appeal. It is argued that the judgment and order of conviction and sentence under challenge is illegal, bad in law and there is incorrect appreciation of the evidence and, therefore, the same is required to be set aside.

3. Shri H.N. Joshi, learned counsel appearing for

the appellant, has concentrated his arguments mainly on legality and validity of the evidence as well as on insufficiency of the evidence. According to him, the learned trial Judge has not concentrated these aspects at all and has recorded the finding on bare words of three Government officials; two of them were serving with Civil Supply Department and the third one is the Police Officer i.e. the complainant. There is no independent witness examined, either a panch or anybody from the neighbourhood, from where the alleged violative and prohibited material was seized or recovered and, therefore, such a judgment and order of conviction and sentence cannot sustain in the eye of law and, therefore, the appellant should be acquitted from the charges levelled against him in respect of the offence in question.

4. There is a strong resistance from the otherside i.e. Shri A.J. Desai, learned Additional Public Prosecutor. It is submitted by him that the evidence of three Government officials should not be discarded merely

because they are Government officials. Two of them were competent to make search and seizure and on information received by the department, both the witnesses had been to the place of the appellant with the Police. It emerges from record that the Police had received some information against the appellant and therefore, the house of the appellant was searched in presence of the Police as well as officers from the Civil Supply Department. There is no reason for any of the officers to implicate the appellant falsely, except the officer who has drawn panchnama of seizure. The other two officers can be equated with witnesses competent to prove the act of search and seizure of the premises of the appellant and hence, the finding of conviction and sentence should be upheld in view of the same and the appeal may be dismissed.

5. To appreciate the rival contentions, firstly it would be necessary to state the facts of the prosecution case in brief. It is alleged that on 01st May, 1993, the Chief Civil Supply Inspector along with his other subordinate

officers had inspected the Room No.106 of Sindhunagar Society. The Police was accompanying the officers and 20 LPG (Liquefied Petroleum Gas) cylinders; three pressure machines to take out the LPG from the cylinders along with steel balance, weighing machine, seven bicycles; were found from the said place and they were seized. The allegation against the appellant is that with the help of pressure machines, the appellant was converting two LPG cylinders into three LPG cylinders and by charging some higher amount, he was selling and distributing the same to various users of the LPGs by employing four labourers. This act of the appellant was violative of Essential Commodity Articles (Licensing, Control and Stock Declaration) Order, 1981, as well as the Liquefied Petroleum Gas (Regulation of Supply and Distribution) Order, 1988.

6. The appellant has been tried summarily. So the prosecution was not to lead detailed evidence as in a warrant trial case but the prosecution was under obligation to lead sufficient

evidence of convincing and cogent nature to link the appellant with the crime. Whether the judgment and order of conviction and sentence is sustainable in the eye of law in the background of criminal jurisprudence, is the question posed by Shri H.N. Joshi, learned counsel appearing for the appellant. The following main aspects are required to be taken into consideration :

(i) The said muddamal articles were seized during the search of the house of the appellant or say the premises under the direct control and conscious possession of the appellant i.e. Room No.106, Sindhunagar Society, in presence of panchas.

(ii) The formal seizure order was passed by the competent officer and the above articles were seized and handed over to one institution referred to in the seizure order Ex.6 namely “Sahakari Haat Gas Agency” of Bhavnagar City holding

licence to distribute LPG cylinders.

(iii) The appellant was arrested in a prohibition case between 12-15 p.m. and 12-30 p.m. on that very day and for that a Criminal Case was also registered against the appellant.

(iv) It is alleged that the appellant himself had signed the seizure memo of panchnama drawn as he was made to remain present by the Police Officer. The appellant was arrested earlier in the Prohibition Case. The search and seizure were carried out in the presence of two panchas of the local area i.e. Kanaiyalal Narandas Rajpal and Chandrakant Dayaram Bachani.

7. On appreciation of the evidence qua the above aspects, the following main infirmities emerge from record :

(i) The Police Officer, who had filed a

Criminal Complaint qua the offence committed by the appellant, has been examined and he has proved the complaint and he had authority to file the complaint which given by the Collector, Bhavnagar, but this witness has neither investigated the crime nor he has recorded the statement of any of the witnesses; and he had handed over the investigation after registration of the offence to one Police Sub Inspector (PSI) Shri Chauhan. This PSI Shri Chauhan has not stepped into the witness-box.

(ii) The panchas of panchnama Ex.5, which was drawn at the time of alleged search, have not been examined. As the said panchnama is signed by the appellant, it would not be safe or otherwise legal to read the contents of this panchnama, especially when the panchas have not been examined.

(iii) There is no evidence on record to show as to who were the panchas when the appellant was arrested in the prohibition case on that very day. So there is no evidence as to the place from where the appellant was arrested in the prohibition case. In view of above, it will be risky to accept the arguments advanced by Shri A.J. Desai, learned Additional Public Prosecutor, that the appellant must have been arrested from that very room itself. As the appellant was not taken to the Police Station for registration of the offence under the Prohibition Act, the Court should accept that the search and seizure must have been made in presence of the appellant in that very room. On account of non-examination of the Investigating Officer, it is clear that the same would seriously prejudice the

defenceside.

(iv) The prosecution ought to have examined somebody from the Cooperative Society, whom the muddamal material was handed over, about actual acceptance of the material seized and its retention by the Society till conclusion of the trial.

(v) There is also no evidence as to the ownership of the said Room No.106 of the said Sindhunagar Society.

(vi) The prosecution should prove beyond reasonable doubt that the premises searched on 01st May, 1993, at 14-15 hrs. was either belonged to the appellant and he is the owner of the premises, or he is the sole occupant of the said premises. For that purpose, the prosecution could have examined the witnesses from the said Sindhunagar Society and the relevant record from the local

self Government namely Bhavnagar Municipal Corporation or the City Survey Department in this regard.

(vii) The Court has reason to believe that after formal arrest in a prohibition case, the appellant must have been taken for blood sampling. It is not even clear that for which offence punishable under the Bombay Prohibition Act, the appellant was arrested, whether it was the case of possession of illegal liquor or consumption of the same, or both; or it was the offence punishable under Section 85 of the Bombay Prohibition Act. Everything has remained in dark through out the trial. No details of the other properties or articles, which can link the appellant with the crime, have been referred to in the panchnama.

8. So the ratio of the decision in the case of ***Mohd.Aslam Khan v. Narcotic Control Bureau and***

another, reported in 1996(9) SCC 462, would help the appellant. It is not necessary to quote the relevant paragraph nos.9 and 10 of the cited decision hereinbelow which are read over before this Court by Shri H.N. Joshi, learned counsel appearing for the appellant; but when at the time of search and seizure, the appellant was in Police custody since 12-30 p.m., in the present case, the appellant ought not to have been linked with the premises from where the material violative of the aforesaid Control Orders was seized.

9. Though independent witnesses could have been examined in the present case as well as the Investigating Officer, it appears that the learned trial Judge has hastily decided to close the evidence of the prosecution. On perusal of the record, it emerges that even there is no closure pursis given by the learned Public Prosecutor. On bare evidence of three Government officials, the appellant ought not to have been linked with such a serious offence. There is some force in the arguments of Shri H.N. Joshi, learned counsel

appearing for the appellant, on perusing the statement of the appellant under Section 313 of the Code of Criminal Procedure, 1973. The attention of the appellant ought to have been drawn qua the contents of the seizure order Ex.6, where the facts in detail were mentioned and violation of the relevant scheme of the Control Orders is also referred to.

10. So if all these facts and circumstances are taken together, it is necessary for this Court to observe that the conviction is bad and cannot sustain in the eye of law. No reasonable opportunity can be said to have been afforded to the appellant. On the contrary, it is possible to observe that the appellant was not offered a fair trial from the very beginning, otherwise while recording the plea, the appellant could have been put to notice about seriousness of the charge in reference to the relevant Control Orders.

11. For short, in view of above observations and discussion, the appeal is hereby allowed. The judgment and order of conviction and sentence dated 06th August, 1994, passed by the learned

Additional Sessions Judge, Bhavnagar, in Special Criminal Case No.4 of 1994, is hereby quashed and set aside. The appellant is ordered to be acquitted from all the charges levelled against him in respect of the offence in question. The bail bond executed by the appellant stand discharged. The amount of fine, if any paid, be refunded to the appellant on proper identification.

(C.K. Buch, J)

Aakar